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80-1503

NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

DICKEY FARMS, INC.

PETITIONER

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE W. MEAD, JR.
1211 Public Service Building
Portland, Oregon 97204
Telephone: (503) 228-7686

John L. Schwabe
SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
1200 Standard Plaza
Portland, Oregon 97204
Telephone: (503) 222-9981
Counsel of Record

QUESTIONS PRESENTED FOR REVIEW

Should a property owner be required to repay the government as the result of a very wrong interpretation - even wrong on its face -of a 1938 judgment?

Did the Government obtain the absolute right in a 1938 condemnation proceeding to permanently flood the land owned by Dickey Farms between 72.5 feet elevation and 83.9 feet elevation?

Should this property owner be treated differently from other property owners whose property around the Bonneville Dam reservoir was acquired?

LIST OF PARTIES

United States of America

Dickey Farms, Inc.

Unknown Owners[1]

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[1]The trial court held that Dickey Farms, Inc. is the only ascertainable claimant and all other claims have been satisfied (A-27).

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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

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DICKEY FARMS, INC.

PETITIONER

v.

UNITED STATES OF AMERICA

~~DEFENDANTS-APPELLEES-PETITIONERS~~

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Dickey Farms, Inc., prays that a Writ of Certiorari issue out of this court to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled

cause. The petitioner further prays for a summary disposition on the merits of the case pursuant to Rule 23.1, Rules of the Supreme Court of the United States, reversing the opinion of the United States Court of Appeals for the Ninth Circuit and reinstating the Memorandum and Order and Judgment of the United States District Court for the Eastern District of Washington.

OPINIONS BELOW

The government raised the issue presented in this case by a motion in limine (R. p. 253). United States District Judge Marshall A. Neill denied the government's motion (Appendix B at pp. A-13-A-20).[2] The government renewed its motion at trial and United States District Judge Ray McNichols again denied it (Tr. p. 38).

The government appealed, and the United States Court of Appeals for the Ninth Circuit reversed and remanded the case for further proceedings.[3] The Ninth

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[2]The Memorandum and Order of the United States District Court for the Eastern District of Washington appears verbatim in Appendix B. The Findings of Fact and Conclusions of Law and Judgment of the United States District Court appear at Appendix C (Appendix C at pp. A-13-A-20; A-21-A-36).

[3]The opinion of the Ninth Circuit Court of Appeals is appended as Appendix A (Appendix A at pp. A-1-A-10).

Circuit Court of Appeals denied the landowner's, Dickey Farms', Petition for Rehearing (Appendix A at p. A-11).

JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on September 5, 1980. It denied a rehearing on December 1, 1980.

The constitutional and statutory provisions conferring jurisdiction on this Court are 28 U.S.C. § 1254(1) and 28 U.S.C. § 2101(c). (See Appendix D, pp. A-37-A-38)

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth and Fourteenth Amendments to the Constitution of the United States:

> "...; nor shall private property be taken for public use, without just compensation." U.S. Const., amend. V.

> "...; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., amend. XIV, § 1.

STATEMENT OF THE CASE

A. Statement of Facts.

In 1937, the United States government built the Bonneville Dam on the Columbia River between Oregon and Washington which created a reservoir upstream behind the dam. The government in 1938 acquired and paid all property owners around the lake for an easement to permanently flood the land up to an elevation of 72.5 feet and to occasionally and periodically flood the land between elevations 72.5 feet and 96 feet, caused primarily by spring run-offs (see the diagram at Appendix E). Since the water rose to the same elevation all around the lake, the government acquired the identical

easement with identical rights at each level for all contiguous property owners. The Government's 1937 Petition in Condemnation for this particular land sought the right to permanently flood to 72.5 feet and to occasionally flood to 96 feet.[4]

In the present condemnation action in 1975, the government took an additional

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[4] "'That the said Bonneville Project when completed will raise the water level of the Columbia River at and opposite the land hereinafter described, to a low water elevation of 72.5 feet above mean sea level, and will permanently flood and overflow the lands of Defendants as herein described, up to elevation 72.5 feet above mean sea level; That the natural flow of said Columbia River, after construction of said Bonneville project will periodically and occasionally raise the flow of said river and will occasionally and periodically flood and overflow all lands hereinafter described up to elevation 91 feet above mean sea level; That to provide for seepage, wave action and other matters, the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level over the lands hereinabove referred to and described as follows ... ." (Appendix B at pp. A-17-A-18) [Emphasis added in part.]

11.4 feet for permanent flooding above the 1938 taking, seeking permanent flooding rights to 83.9 feet. The government again paid all landowners on the same basis for the additional 11.4 feet except the Dickeys who have not been treated the same. Here is how that was done:

When the government condemned the Dickeys' land in 1975, it estimated that just compensation would be $302,000 and deposited this amount into court (R. pp. 7, 15).[5] The Dickeys disputed the government's valuation, and a trial was scheduled to resolve only the question of value (See Pre-Trial Order, R. p. 87). As is normally

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[5]The interest taken was eventually valued at $522,000 (Appendix C at p. A-32). The 11.4 feet additional elevation of water resulted in the flooding of 60.22 acres and the loss of use of another 8.78 acres. The trial court found that this unique farm land (Nov. 2, 1976 Tr. p. 22) was worth $6,000 per acre (Appendix C at p. A-30).

done, the Dickeys petitioned for distribution of the $302,000 to them and, after a hearing, the trial court entered an order disbursing the moneys deposited by the government to the Dickeys (R. p. 39). The Dickeys spent a considerable portion of the money for heavy-duty pumping equipment and improved diking systems needed to handle the new permanent flooding above the previous level of 72.5 feet.

Months after Dickeys withdrew and spent the money, discovery was largely completed, the pre-trial order had been lodged[6] and a trial date had been set in this case, the government suddenly invented a theory that it had <u>already</u> taken the

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[6]The government did not raise the issue of the effect of the 1938 judgment in the pre-trial order (<u>See</u> Nov. 2, 1976 Tr. p. 35).

land up to 96 feet for permanent flooding and so owed the Dickeys nothing. The government based its new theory upon the Final Judgment document in the 1938 condemnation proceeding (Tr. p. 12). The government moved to exclude all testimony relating to the value of the land to be permanently submerged by this taking (R. p. 253).

The United States District Court denied the government's motion in limine and held that the United States did not acquire the right to permanently flood land above the 72.5 foot level in 1938 (Appendix B at p. A-20). The District Court correctly reasoned that the 1938 judgment describes the interest taken by reference to the government's petition for condemnation (Appendix B at p. A-17).

The 1938 Judgment reads that the government shall be entitled to:

> "'... the right and easement to overflow and flood each of the tracts of land described in said petitions, up to the 96-foot contour line... is hereby vested in the Petitioner, herein, the United States of America." (Appendix B at pp. A-16-A-17)

The petition specifically defines the easement taken as permanent flooding to 72.5 feet, "periodic and occasional" flooding to 91 feet, and wave action to 96 feet, all of which are referred to in general terms as a "flowage easement" (Appendix B at p. A-18). See n. 4, p. 6, supra.

The government renewed its motion at the beginning of trial before a different United States District Judge, Judge Ray McNichols, and he also denied the motion (Tr. p. 38).

On appeal by the government,[7] the United States Court of Appeals for the Ninth Circuit reversed (Appendix A at p. A-8) and denied rehearing (Appendix A at p. A-11).

B. Basis for Federal Jurisdiction.

Federal jurisdiction in the court of first instance rested upon 28 U.S.C. § 1358 (see Appendix D).

REASONS FOR ALLOWING WRIT

This case admittedly involves just the Government versus the Dickeys. This case does not involve the usual legal bases for which certiorari is customarily sought. However, the decision of the Ninth Circuit Court of Appeals requiring this private property owner alone to

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[7]The government even vacillated on whether to appeal the matter. The government requested additional time to "determine whether the appeal in this case should be prosecuted" (R. p. 375).

repay the government for property acquired and damaged by the government is so blatantly wrong - wrong on its face - that this court should grant the writ of certiorari. This court has on other occasions granted the writ of certiorari and even summarily reversed in order to correct an unconscionable result.

The Dickeys have been treated differently from other landowners on the Bonneville reservoir -- all as a result of the Government using some imperfect and unspecific language in a forty year old judgment and a fragmentary and unreliable record. The Government acknowledged that it must and did compensate the Dickeys in the sum of $302,000 for the taking of their land for additional permanent flooding; the only question was how much the Government must pay.

Then, after the Dickeys acted in detrimental reliance upon the Government's position, the government abruptly reversed its position and said it owed the Dickeys nothing. The government should be estopped[8] and not allowed to succeed with such a practice.

I. The Judgment and Petition Described Only a Limited Use.

The opinion of the Ninth Circuit Court of Appeals is very wrong--even wrong on its face. The government did not acquire the right to permanently flood the Dickey's land above 72.5 feet in 1938.

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[8]This issue of equitable estoppel was raised and preserved at the trial court on pages 13, 30, 35, 36, 59 and 62 of the transcript dated November 2, 1976.

The government, the Ninth Circuit Court of Appeals, and the Dickeys all agree that the general rule is that a judgment must be construed according to the intention of the court, and all parties agree that if the judgment is ambiguous, one next resorts to the pleadings. Gila Valley Irr. Dist. v. United States, 118 F.2d 507, 510-511 (9th Cir. 1941).

In order to determine precisely what the government sought to acquire in the 1937 condemnation petition, one must first refer to the specific descriptions of lands being acquired and the interest being acquired in such lands. The petition describes the interests being acquired in paragraph IV. Paragraph IV first generally describes the easement to be acquired in all of the 6 tracts of land covered by the petition and then specifically describes,

by elevation and acreage, the easement being taken for each individual tract and parcel therein. The Dickey's property is Parcel No. 4 of Tract 1, referred to in those allegations as the property of James Alexander Henderson and wife, as follows:

> [The general description of the interest applicable to all parcels which the Circuit Court did discuss appeals first]:
>
> "IV.
>
> "That the said Bonneville Project when completed, will raise the water level of the Columbia River at and opposite the lands hereinafter described, to a low water elevation of 72.5 feet above mean sea level, and will permanently flood and overflow the lands of defendants as herein described, up to elevation 72.5 feet above mean sea level; That the natural flow of said Columbia River, after the construction of the said Bonneville Project, will periodically and occasionally raise the flow of said river to elevation 91 feet above

mean sea level, and will occasionally and periodically flood and overflow all lands hereinafter described up to elevation 91 feet above mean sea level; That to provide for seepage, wave action and other matters, ..."

"....."

[The specific description of the interest overlooked by the court follows]:

"That the lands herein described as lands of James Alexander Henderson and wife, are designated in this petition as 'Tract 1'. Said Tract 1 consists of a total of 208.3 acres. The number of acres over which a flowage easement is sought in this proceeding is 103.6, of which 24.4 acres will be permanently flooded by the Bonneville Project. Lands in said Tract 1 lying above elevation 72.5 feet above mean sea level and below 91 feet above mean sea level, consisting of 76.0 acres, will be occasionally and periodically overflowed. Lands lying between elevation 91 feet above mean sea level and elevation 96 feet above mean sea level consist of 3.20 acres." (App. Br. Appendix pp. 20, 22-23)

It will be noted that the foregoing allegations expressly describe the total acreage which is a composite of both permanent and occasional easements and the total of which is referred to as a "flowage easement". However, it further breaks the total composite acreage into component parts of the different kinds of interests by different elevations and acreages. For example, 24.4 acres up to 72.5 feet will be permanently flooded, 76.0 acres from 72.5 feet to 91 feet will be occasionally and periodically flooded, and 3.20 acres from 91 feet to 96 feet will be occasionally and periodically flooded by seepage and wave action. All of these components consist of a total of 103.6 acres, which is generally described as a "flowage easement".[9]

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[9]The Government determined in 1975 that, of the original 103.6 acres involved, it needed to permanently flood an additional 60.22 acres (Appendix B at p. A-27).

Therefore, the petition clearly refers to both permanent and occasional easements; there is no basis for the Court's interpretation that it refers solely to a permanent easement. Furthermore, the specific language in the petition describing different elevations and acreages would be superfluous if the government acquired only a permanent easement. This specific language is directly related to the more general language in the first section of paragraph IV which, likewise, refers to the elevation of 72.5 feet for permanent flooding, and above 91 feet to 96 feet for seepage and wave action. The general language set forth in the first section of paragraph IV cannot be more specific in terms of acreage because there are a number of defendants and different parcels

involved and different acreages for permanent and occasional flooding must be acquired for each parcel. Thus, it is abundantly clear, after examining both the general and specific language of the petition, that the "flowage easement" granted in the judgment refers to and includes both permanent and occasional flooding.

The only reason given by the circuit court for not following the clear language of paragraph IV is that such language may be read as stating the reason why "'the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level.'" (Appendix A at A-10) Paragraph III of the petition, however, clearly states the reason for acquisition, i.e., navigation and construction of the

dam and powerhouse (App. Br. Appendix, p. 20). The Court of Appeals erred in not reading or considering the specific allegations differentiating between permanent and occasional easements. The Court of Appeal's neglect and oversight of this key portion of the 1937 condemnation petition caused an unconscionable and wrong result.

The Government is bound to deal fairly and justly with its citizens when taking their land. If the Government attempts to avoid payment of any compensation for a person's interest, its decision should be based on clear, strong evidence and sound legal reasoning.[10]

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[10]The court points to the instructions in the 1938 case as further "clear" evidence (Appendix A at p. A-7). No one knows exactly how the court instructed the jury because the transcript has been lost and only parts of the instructions can be culled from the briefs. The fact that the jury awarded the landowners less than even some

II. Defendants Have Been Deprived of the Equal Protection of the Laws.

The Government's action in dealing with Dickey Farms violates the guarantees of due process and equal protection secured by the United States Constitution. The government compensated all of the other landowners along the Columbia River for the taking of their land above 72.5 feet. Only Dickey Farms was denied just compensation on grounds that the interest was already taken in 1937.

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[10](continued) of the Government's appraisal values constitutes just a "clear" evidence that the court instructed the jury in accordance with the Government's theory that it was not taking the entire value of the land because it intended to flood most of the land only occasionally rather than instructing in accordance with the landowner's contention the government condemned the entire value of the land (See Appendix A at pp. A-7-A-8).

The Government admitted in other legal actions in 1975 that prior easements granted it the right to permanently flood only to 72.5 feet in 1938. See, e.g., the Pre-Trial Orders in United States v. Wells and Hood River Village, Civil No. 74-929 (D. Or. filed Nov. 26, 1974); United States v. Port of Cascade Locks, et al., Civil No. 74-1019 (D. Or. filed Dec. 30, 1974); United States v. Nelson, et al., Civil No. 74-915 (D. Or. filed Nov. 22, 1980).[11]

The Government did not raise the issue of the 1938 judgment in negotiations or legal actions with other landowners. Will the government demand repayment

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[11] Petitioner requested the Court to take judicial notice of all three of the above Pre-Trial Orders. (See letter dated May 14, 1980, from John L. Schwabe to Mr. Richard Deane). Lambert v. Conrad, 308 F.2d 571 (9th Cir. 1962).

from other landowners bound by the same 1938 judgment who have been paid for the 1975 taking? The government paid one of the other landowners adjacent to the Dickeys bound by the same 1938 judgment over $1,000,000 for a smaller parcel of land (Tr. pp. 34, 35, 39). The government proposes to pay the Dickeys, bound by that same exact judgment, absolutely nothing other than for some minor rights. The government unfairly discriminated against Dickey Farms. The law mandates equal treatment. No rational basis exists for treating the Dickeys differently from other landowners.

III. The Doctrine of Equitable Estoppel Should be Applied.

This is a classic case for application of the doctrine of estoppel, both by operation of the eminent domain statutes,

by admissions by the government which it seeks to ignore, and by the hardship caused by the Dickey's reliance upon the government's position.

The eminent domain statutes provide that the government takes title to the land and can take possession of the land only if they filed a Declaration of Taking, they deposited the estimated just compensation, and the owner's title is clear. The Government recognized that it held only an easement for occasional flooding above 72.5 feet and would need to purchase a permanent flooding easement.[12] Title to the disputed land vested in the United States when it filed its Declaration of Taking and deposited the funds in July,

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[12] See Tr. pp. 24, 26, and 29.

1975 (40 U.S.C. § 258a[13]). The government then asserted that it was entitled to possession of the land and took possession of the land (R. p. 16).

In the meantime, the Dickeys detrimentally relied upon the government's position. They proceeded with their defense of the Government's condemnation action, hired experts, and the like; they withdrew the deposited funds, and they improved the land to handle the flooding with extensive diking and pumping. In September, 1975, the court ordered payment of compensation to the Dickeys, which it is permitted to do by statute

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[13]This provision was enacted for the benefit of the Government so that it can obtain immediate possession of the land in order to commence the public project and can prevent the accrual of interest. United States v. Dow, 357 U.S. 17, 23, 78 S. Ct. 1039, 2 L. Ed.2d 1109 (1958).

only if the owner's title is clear. 40 U.S.C. § 258(a); 33 U.S.C. § 594. Thus, the Government conceded the Dickeys' title to the land between 72.5 feet and 83.9 feet.

Once the Government took the Dickeys' land and paid the sum it considered to be just compensation, it should be estopped from reversing its position. In Danforth v. United States, 308 U.S. 271, 284, 60 S. Ct. 231, 84 L. Ed. 240 (1939), this court stated that a condemnor could not abandon or discontinue his efforts after the taking. The act of taking is the all-important and crucial act of solidification and irreversibility of positions.

Estoppel should apply in a judicial sense as well as by operation of the condemnation statutes. The Government is attempting to contradict statements

and admissions in its pleadings.[14] It invented and asserted its new interpretation of the 1938 judgment in the case after it admitted the Dickey Farm's title and after the lodging of the pre-trial order framed the issues in the case. The result is contrary to this court's statement in United States v. Louisiana, 394 U.S. 11, 73, 89 S. Ct. 773, 22 L. Ed.2d 44 (1969), rehearing denied, 394 U.S. 994, 89 S. Ct. 1451, 29 L. Ed.2d 861 (1969). In that case, the Government conceded a point in the early stages of litigation. The Supreme Court held that the Government's concession did not estop it from denying the same point later,

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[14] Davis v. Wakelee, 156 U.S. 680, 15 S. Ct. 555, 39 L. Ed. 578 (1895); see also Fortier v. New Orleans Nat. Bank, 112 U.S. 439, 445, 5 S. Ct. 234, 28 L. Ed. 764 (1884).

but only because the other party had not detrimentally relied upon the concession. Unlike the other party in that case, the Dickeys indisputably relied upon the Government's assertions. Landowners have been estopped in condemnation proceedings once title and money changed hands as here and, in a sense of fairness and equality, the Government should be estopped in the same situation. See, e.g., Winslow v. Baltimore & O. R. Co., 208 U.S. 59, 63, 28 S. Ct. 190, 52 L. Ed. 388 (1908).[15]

The Government acknowledged the Dickeys' entitlement to the land for purposes other than occasional flooding.

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[15] In Winslow v. Baltimore & O. R. Co., supra, this court held that, by accepting the sum awarded in condemnation proceedings, the landowners were estopped to insist that a petition in condemnation could not be maintained.

It should be estopped to reverse its position belatedly in the middle of the proceedings causing much harm to the Dickeys as a result of their reliance on the Government's long-standing position.

CONCLUSION

The Writ of Certiorari should be granted, and the opinion of the Ninth Circuit should be summarily reversed and the decision of the United States District Court for the Eastern District of Washington should be reinstated.

Respectfully submitted,

GEORGE A. MEAD

SCHWABE, WILLIAMSON, WYATT,
MOORE & ROBERTS
JOHN L. SCHWABE

By: _____
JOHN L. SCHWABE
Of Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITES STATES OF AMERICA Plaintiff-Appellant, v. 60.22 ACRES OF LAND, more or less, situate in Klickitat County, State of Washington; DICKEY FARM, INC., a corporation; KLICKITAT COUNTY, WASHINGTON, a municipal corporation; and UNKNOWN OWNERS, Defendants-Appellees.	)	No. 78-1132 D.C. No. C-75-161 OPINION

Submitted May 19, 1980

Appeal from the United States District Court for the Eastern District of Washington

Before: CHOY and FERGUSON, Circuit Judges, and BARTELS,* District Judge

*The Honorable John R. Bartels, Senior District Judge for the Eastern District of New York, sitting by designation.

CHOY, Circuit Judge:

The district court determined that a 1938 condemnation judgment did not grant the Government an unrestricted flowage easement over specified lands and, accordingly, fixed just compensation for the easement. Finding the district court's determination to be incorrect, we reverse and remand the case for further proceedings.

In 1975 the Goverment filed a complaint in condemnation seeking "the perpetual right, power, privilege and easement permanently to overflow, flood and submerge" the described land below the elevation of 83.9 feet mean sea level, to maintain mosquito control, and to clear any brush, debris and natural obstructions detrimental to the project; and also seeking the title to the timber

and the improvements on the land. The complaint also sought to keep the land clear of structures for human habitation and other structures, excavations, and landfill projects that did not have Government approval. The Goverment identified Dickey Farms, Inc. as the record owner.

In August 1976 the Government filed a motion in limine to limit the testimony at trial to reflect that by a 1938 judgment the Goverment had acquired title to an unrestricted flowage easement up to an elevation of 96 feet above mean sea level on the land in question.

In 1937 the Government had petitioned for condemnation of a flowage easement over several parcels of land near the Bonneville Dam Project. The 1937 petition stated that the dam would raise the water level of the Columbia

River so as permanently to flood and to overflow the described lands up to an elevation of 72.5 feet above mean sea level, that the natural flow of the river periodically would raise the water level on these lands up to an elevation of 91 feet above mean sea level, and "[t]hat to provide for seepage, wave action and other matters, the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level" over the described lands. The 1938 judgment ordered the condemnation of the easement.

The district court in the instant case concluded that the 1938 condemnation judgment granted the Goverment the right permanently to flood the land only up to an elevation of 72.5 feet mean sea level

and the right periodically to flood the land up to 96 feet mean sea level, as well as the right to remove debris. The district court concluded that the Government would have to pay just compensation for the right permanently to flood the land up to 83.9 feet mean sea level and denied the Government's motion in limine.

On appeal the Government claims the right to an unrestricted easement. Dickey Farms contends that because the Government complaint in this action identified only Dickey Farms as record owner of the parcel of land in question, the Government is estopped from asserting any ownership rights and, in the alternative, that the language of the 1937 condemnation petition limits the extent of the easement granted in the 1938 judgment. We disagree with both of these contentions.

Initiation of a condemnation action does not constitute a waiver by the Government of previously-acquired rights. See United States v. 93.970 Acres of Land, 360 U.S. 328 (1959); Mollohan v. Gray, 413 F.2d. 349 (9th Cir. 1969) (dictum). The Government here is not estopped from claiming the right to an unrestricted easement merely because it instituted a condemnation action naming Dickey Farms as the record owner of the property.

The 1938 judgment on verdict granted the United States "a flowage easement over each of said tracts of land mentioned in the petitions herein up to 96 feet above mean sea level," and the final judgment in condemnation specifically granted "the right and easement to overflow and flood each of the tracts of land described in said petitions, up to

the 96-foot contour line above mean sea level, together with the right to go upon and remove therefrom timber, brush and driftwood."

It is our responsibility to construe a judgment so as to give effect to the intention of the court, not to that of the parties. See Gila Valley Irrigation District v. United States, 118 F.2d. 507, 510-11 (9th Cir. 1941). We believe that both 1938 judgments clearly express the court's intention to grant the Government an unrestricted easement up to an elevation of 96 feet mean sea level.

Even if the language of the final judgment itself did not convince us that the easement is unrestricted, the jury instructions given by the 1938 court surely would. The district court in that action instructed the jury that the

owners of the land were entitled "to the full value of their lands at and below 96 feet above mean sea level" and that the Government was condemning "a perpetual flowage easement without limitation or restriction up to an elevation of 96 feet above sea level."

With such clear evidence supporting the Government's position, we cannot deny its claim. However sympathetic we may be to the landowner and regardless whether the Government has actually used the easement to the full extent, we are bound by the previous judgment.[1/]

REVERSED AND REMANDED for proceedings to determine just compensation for the additional rights the Government is seeking in this action.

Footnote

1 [reference on page 4 (A-8)]

Appellees rely on the following portion of the 1937 condemnation petition:

> That the said Bonneville Project when completed, will raise the water level of the Columbia River at and opposite the lands hereinafter described, to a low water elevation of 72.5 feet above mean sea level, and will permanently flood and overflow the lands of defendants as herein described, up to elevation 72.5 feet above mean sea level; That the natural flow of said Columbia River, after the construction of the said Bonneville Project, will periodically and occasionally raise the flow of said river to elevation 91 feet above mean sea level, and will occasionally and periodically flood and overflow all lands hereinafter described up to elevation 91 feet above mean sea level; That to provide for seepage, wave action and other matters, the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level over the lands hereinabove referred to.

The language of the petition does not directly contradict our understanding of the 1938 judgment. Rather than restricting the easement, the petition may be read as stating the reason why "the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level." This interpretation supports the conclusion that the Government both requested and received an unrestricted easement up to an elevation of 96 feet mean sea level.

UNITED STATES COURT OF APPEALS

FOR THE NINTH COURT

UNITED STATES OF AMERICA Plaintiff-Appellant, v. 60.22 ACRES OF LAND, More or less, situated in Klickitat County, State of Washington; DICKEY FARM, INC., a corporation; KLICKITAT COUNTY, WASHINGTON, a municipal corporation; and UNKNOWN OWNERS, Defendants-Appellees.	No. 78-1132 DC No. C-75-161 ORDER

Before: CHOY and FERGUSON, Circuit Judges, and BARTELS,* District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

*The Honorable John R. Bartels, Senior District Judge for the Eastern District of New York, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has voted to grant rehearing en banc. F.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX B

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA Plaintiff, -vs- 60.22 ACRES OF LAND, m/l, in Klickitat County, State of Washington; DICKEY FARMS, INC. a corporation; et al, Defendants.	No. C-75-161 MEMORANDUM AND ORDER

This condemnation action was filed by the United States of America on behalf of the Department of the Army, Corps of Engineers, to acquire the perpetual right, power, privilege and easement to overflow, flood, and submerge lands along the Columbia River. In the Declaration of Taking

the land subject to the flowage easement is described as the land lying above 72.00 feet above mean sea level and below 83.90 feet above mean sea level. The United States of America is also taking the right to conduct mosquito abatement programs on the subject lands, remove debris from the lands, and the right to prohibit human habitation in the covered areas. Planned changes in the operation of the Bonneville Dam necessitate acquisition of these interests.

The government has filed a motion in limine seeking to restrict the evidence at the trial on just compensation to the valuation of the rights to conduct the mosquito control programs, to clear debris, and to prohibit human habitation. It is the position of the government that only these interests are being

acquired because the right to permanently overflow the lands up to 96 feet above mean sea level was acquired in a previous condemnation action in 1938. The right to overflow and flood the lands up to 83.90 feet above mean sea level described in the Declaration of Taking in this case, the government contends, must be disregarded as superflous [sic] because that right was acquired in the 1938 action.

The landowners contend, however, that the government acquired in 1938 the right to permanently flood and overflow their lands only up to 72.5 feet above mean sea level together with the right to occasionally flood and overflow the lands lying between 72.5 and 96.0 feet above mean sea level. The landowners agree that the government did acquire the right to clear debris in the subject

area in the 1938 action. The landowners assert the government acquired the right to occasionally flood up to 96 feet above mean sea level in 1938, and not the right to permanently flood and submerge lands up to that mark. This later right, but reduced to the 83.90 level, still must be taken in the opinion of the landowners. Hence, the landowners argue that restricting the evidence per the motion in limine prevents them from obtaining just compensation for the interests, as defined by the landowners, taken in this current action.

A close examination of the Final Judgment entered in the 1938 action resolves this problem. That judgment states:

> NOW THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the right and easement to overflow

> and flood each of the tracts of land described in said petitions, (the original petitions in the condemnation) up to the 96-foot contour line above mean sea level together with the right to go upon and remove therefrom timber, brush and driftwood, is hereby vested in the Petitioner, herein, the United States of America. [Emphasis added]

It is clear that the Final Judgment described the interest taken by reference to the original petitions. Hence, the descriptions of the interests in the original petitions delineate the interests taken in 1938.

The 1938 Petition for Condemnation of Flowage Easement over the defendants' lands defines the easement to be taken as:

> That the said Bonneville project when completed will raise the water level of the Columbia River at and opposite the land hereinafter described, to a low water elevation of 72.5 feet

> above mean sea level, and will permanently flood and overflow the lands of Defendants as herein described, up to elevation 72.5 feet above mean sea level; That the natural flow of said Columbia River, after construction of said Bonneville project will periodically and occasionally raise the flow of said river and will occasionally and periodically flood and overflow all lands hereinafter described up to elevation 91 feet above mean sea level; That to provide for seepage, wave action and other matters, the Secretary of War has determined it is desirable and necessary to acquire a flowage easement up to 96 feet above mean sea level over the lands hereinabove referred to and described as follows. [Emphasis added]

As stated in 6 Nichols on Eminent Domain § 26.11 P. 26-7

> The Petition serves as Notice of the appropriation and its extent and limitations.

Thus, the original petition describes the interests taken as the right to permanently flood and overflow the lands

up to 72.5 feet above mean sea level, the right to periodically and occasionally raise the flow of the river to 91 feet above mean sea level, an additional 5 feet of flowage easement to provide for seepage and wave action, and the right to remove debris and brush from the land subject to the flowage easement.

If the Final Judgment in Condemnation is read in conjunction with the original petitions it is apparent that the United States did not acquire the right to permanently flood and overflow the subject lands up to 96 feet above mean sea level in the 1938 actions. Rather, the government acquired only the right to permanently flood up to 72.5 feet above mean sea level, the right to periodically flood lands up to 96 feet above mean sea level, and the right to remove

debris from the lands subject to the easement. On the basis of the present record the Court finds that the government's interpretation of the 1938 taking is incorrect.

WHEREFORE, IT IS ORDERED that the Motion in Limine is DENIED.

DONE BY THE COURT this 18th day of April, 1977.

/s/Marshall A. Neill
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA Plaintiff, vs. 60.22 ACRES OF LAND, more or less, situate in Klickitat County, State of Washington, and DICKEY FARMS, INC., a corporation, and UNKNOWN OWNERS, Defendants.	Civil No. C-75-161 FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on for trial on May 16, 1977, before the Court sitting without a jury. By Stipulation a jury was waived by both parties. Oral and documentary evidence was received, and after due procedures the Court tentatively entered its Oral Opinion on May 25, 1977. The Court having now examined the

entire file, and having had advantage of proposed Findings of Fact and Conclusions of Law by the parties, makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

I.

This is a condemnation action. Jurisdiction is found in 28 U.S.C. §1358. The action is brought by the United States of America for the taking of property under the power of eminent domain and for the ascertainment and award of just compensation to the owners for the property taken.

II.

The authority for the taking is the Act of Congress approved February 26, 1931 (46 Stat. 1421, 40 U.S.C. 258a),

and acts supplementary thereto and amendatory thereof, and under the further authority of the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C. 591), and March 1, 1917 (39 Stat. 948, 33 U.S.C. 701), which acts authorize the acquisition of land for flood control projects; the Act of Congress approved August 30, 1935 (49 Stat. 1028), which act authorizes the construction of the Bonneville Lock and Dam (Oregon); the Act of Congress approved August 20, 1937 (50 Stat. 731), which act authorized completion, maintenance and operation of the project, and the Act of Congress approved August 28, 1974 (Public Law 93-393), which Act appropriated funds for such purposes.

III.

The public uses for which said lands were taken are as follows: The said lands, etc., are necessary to provide for the construction of a river improvement for the purposes of flood control, navigation and other purposes incident thereto. The said land has been selected for acquisition by the United States for use in connection with the re-regulation of the peaking discharge which must be provided at the Bonneville Dam, and for such other uses as may be authorized by Congress or by Executive Order.

IV.

The estate taken for said public uses is the perpetual right, power, privilege and easement permanently to overflow, flood and submerge the land described in

Schedule A and to maintain mosquito control in connection with the operation and maintenance of the Bonneville Lock and Dam project as authorized by the Act of Congress approved August 20, 1937, and the continuing right to clear and remove any brush, debris and natural obstructions which, in the opinion of the representative of the United States in charge of the project, may be detrimental to the project, together with all right, title and interest in and to the timber, structures and improvements situate on the land; provided that no structures for human habitation shall be constructed or maintained on the land, that no other structures shall be constructed or maintained on the land except as may be approved in writing by the representative of the United States in charge of

the project, and that no excavation shall be conducted and no landfill placed on the land without such approval as to the location and method of excavation and/or placement of landfill; the above estate is taken subject to existing easements for public roads and highways, public utilities, railroads and pipelines; reserving, however, to the landowners, their heirs and assigns, all such rights and privileges as may be used and enjoyed without interfering with the use of the project for the purposes authorized by Congress or abridging the rights and easement hereby acquired; provided further that any use of the land shall be subject to Federal and state laws with respect to pollution.

V.

The property so taken is described in Exhibit A, attached hereto and made a part hereto.

VI.

The only claimant having or claiming an interest in the property acquired, whose name is ascertainable by reasonably diligent search of the records, and whose name is [sic] otherwise been learned, is Dickey Farms, Inc., a Washington corporation, the record owner. All other claims have been satisfied or have no validity.

VII.

On July 25, 1975, a Declaration of Taking was filed in the above-entitled cause covering lands described above and in which estimated just compensation was

deposited with the Clerk of the Court in the sum of $301,900.00. The date of take [sic], being the date for the determination of the fair market value of the property taken is therefore July 25, 1975.

The property above described and taken is presently used as intensive row crow [sic] irrigated farm land with improvements thereon and adjacent thereto, used as a portion of the agricultural and production activities conducted on the premises. The highest and best use for the land taken was as used by the owner, to-wit: intensive row crow [sic] agricultural irrigated farm land.

VIII.

The full and fair market value and the full amount of damages and just compensation to be paid to Dickey Farms, Inc., is as follows:

1. The property in the take [sic] area below mean-sea elevation of 83.9 feet constitutes 60.22 acres. Such property will have a greatly reduced remaining value.

2. Of the several costs of cure suggested, the same fall in two categories:

(1) Suggested cost of cure that will not be a satisfactory cure; and

(2) A proposed cure, the cost of which would exceed the market value of the premises, and is not a practical solution to provide just compensation to the land owner.

IX.

Contiguous property to the above-referred to 60.22 acre tract, but above the 83.9 elevation, comprising 8.78 acres, will likewise be greatly reduced in value

because of the narrow configuration and scattered position of the contiguous property.

X.

The fair market value of the 60.22 acres lying below elevation 83.9 and the contiguous 8.78 acres form a farming unit and should be considered as a whole. On the date of the take the said property used at its highest and best use, as presently used, had a fair market value of $6,000 per acre or a total of $414,000 for the 69-acre tract.

XI.

That the fair market value of the 69 acres, immediately after the take [sic], is the sum of $52,000 computed at a value of $740.00 per acre, or if broken

out, computed at $500 per acre for 60.22 acres and $2,500 per acre for 8.78 acres.

XII.

The just compensation for the taking of the said real property is $414,000, being the value prior to the take [sic], less the $52,000 residual value after the take [sic] or just compensation in the sum of $362,000.

XIII.

The improvements on the property damaged by way of severance have a fair market value of $185,000 with a residual or salvage value of $25,000, or a loss to the owner of $160,000 which must be compensated as just compensation.

XIV.

The just compensation to be paid to the owner for the property taken is the sum of $522,000 ($362,000 + $160,000).

XV.

No other defendant named in this litigation, and no persons listed as being "unknown" has any right to share in the compensation payable for the taking and the entire amount of just compensation is to be paid to Dickey Farms, Inc.

From the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

I.

The Court has jurisdiction of the parties and the subject matter of this action.

II.

The public uses found to exist require the condemnation of said property.

III.

The Judgment to be entered herein should direct the payment of just compensation in the sum of $522,000 to Dickey Farms, Inc., and should provide that none of the other defendants named or described in these proceedings have any right to share in the compensation payable for the taking of the estate in the said real property.

IV.

The payment of said sum shall constitute full settlement of all claims against the United States of America arising out of the taking of said property.

V.

That the defendant, Dickey Farms, Inc., is entitled to interest on the difference between the deposit of $301,900 and the just compensation which the Court has determined to be $522,000. The difference being the sum of $220,100 on which said interest is to be computed at the legal rate from the date of the take [sic], July 25, 1975, to the date of deposit by the plaintiff of the balance due to the defendants hereunder.

VI.

Finding no costs are to be allowed.

/s/ Ray McNichols
RAY McNICHOLS, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA Plaintiff, v. 60.22 ACRES OF LAND, more or less, situate in Klickitat County, State of Washington, and DICKEY FARMS, INC., a corporation, and UNKNOWN OWNERS, Defendants.	)	Civil No. C-75-161 JUDGMENT

Based upon the Findings of Fact and Conclusions of Law entered by the court, plaintiff shall pay just compensation to Defendant Dickey Farms, Inc., in the sum of $522,000.00, together with interest at the rate of six per cent [sic] per annum from the date of taking, July 25, 1975, until the date of deposit upon the sum

of $220,100.00, and no other defendants named or described in these proceedings have any right to share in the compensation payable for the taking of the estate in the condemned real property.

DATED this 1st day of August, 1977.

/s/ Ray McNichols
United States District Court Judge

PRESENTED BY:

John L. Schwabe
Attorney for Defendant
Dickey Farms

APPENDIX D

STATUTORY PROVISIONS

"28 U.S.C. § 2101. Supreme Court; time for appeal or certiorari; docketing; stay

"....

"(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days."

"28 U.S.C. § 1254. Courts of appeals; certiorari; appeal; certified questions

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

"(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; ... ."

"28 U.S.C. § 1358. Eminent domain

"The district courts shall have original jurisdiction of all proceedings to condemn real estate for the use of the United States or its departments or agencies."

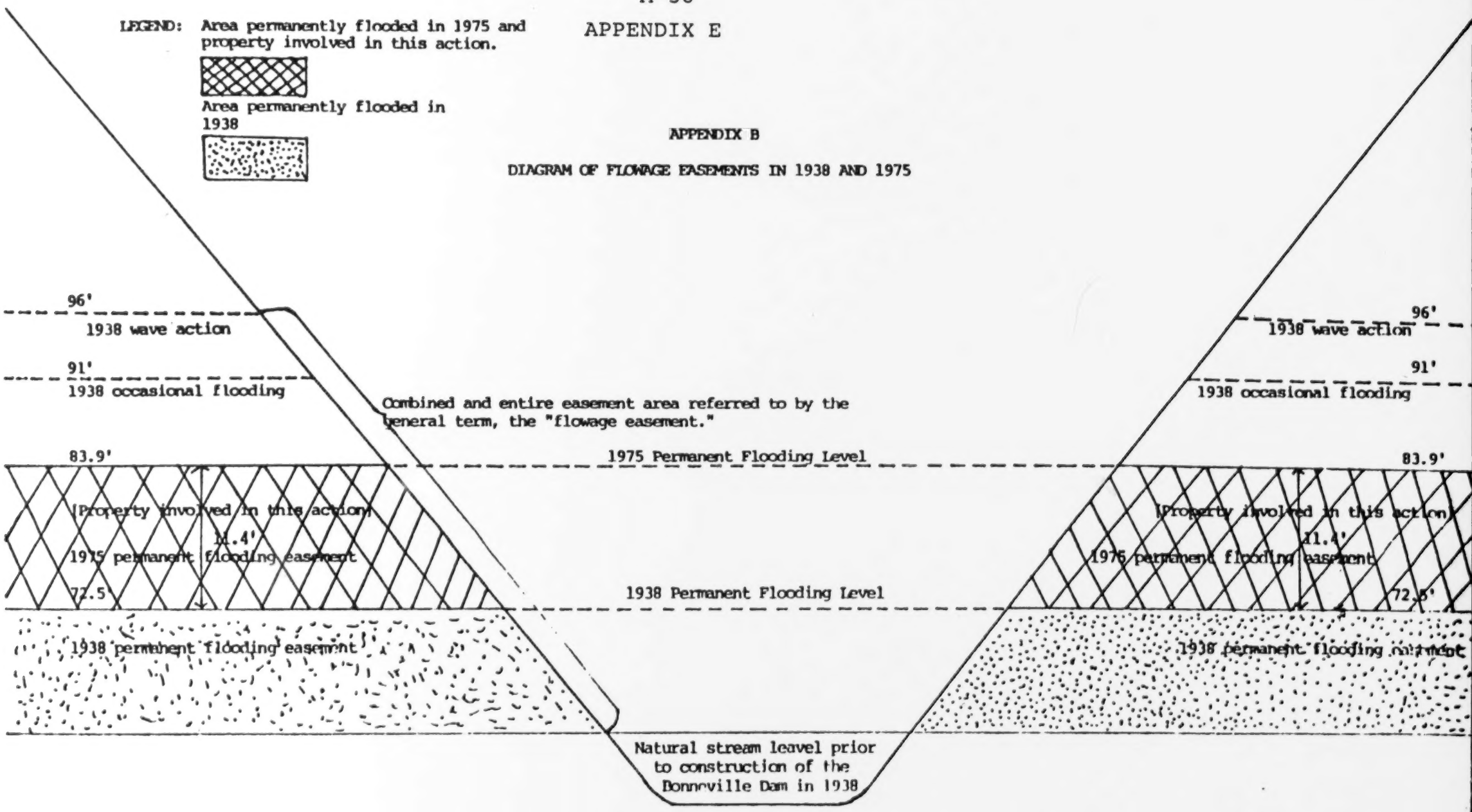
APPENDIX E

LEGEND: Area permanently flooded in 1975 and property involved in this action.

Area permanently flooded in 1938

APPENDIX B

DIAGRAM OF FLOWAGE EASEMENTS IN 1938 AND 1975


96'
1938 wave action
91'
1938 occasional flooding
Combined and entire easement area referred to by the general term, the "flowage easement."
83.9'
1975 Permanent Flooding Level
[Property involved in this action]
11.4'
1975 permanent flooding easement
72.5'
1938 Permanent Flooding Level
1938 permanent flooding easement
Natural stream leavel prior to construction of the Bonneville Dam in 1938

Office-Supreme Court, U.S.
FILED
APR 27 1981
STEVAS,
CLERK

No. 80-1503

In the Supreme Court of the United States

OCTOBER TERM, 1980

DICKEY FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether the court of appeals correctly interpreted a 1938 judgment of the United States District Court for the Eastern District of Washington as granting the United States an unrestricted flowage easement over petitioner's land up to 96 feet above mean sea level.

2. Whether petitioner was denied the equal protection of the laws where the government possibly paid another landowner twice for the same flowage easement and declined to make a similar double payment to petitioner.

3. Whether the filing of the condemnation petition estopped the government from relying on its rights under the 1938 judgment.

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1503

DICKEY FARMS, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A-1 to A-10), the memorandum and order of the district court, entered on April 18, 1977 (Pet. App. A-13 to A-20), and the findings of fact and conclusions of law of the district court (Pet. App. A-21 to A-36) are not reported.

JURISDICTION

The decision of the court of appeals was entered on September 5, 1980. A timely petition for rehearing was denied on December 1, 1980 (Pet. App. A-11 to A-12). The petition for a writ of certiorari was filed on February 27, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. This action was begun on July 25, 1975, with the filing in the district court of a complaint in condemnation and a declaration of taking, and the simultaneous deposit of $302,000 estimated just compensation (R. 1, 9).[1] The interest to be taken included the right permanently to flood certain land up to 83.9 feet above mean sea level for use in conjunction with the Bonneville Dam.[2]

Prior to trial the government discovered that the United States had already acquired a flowage easement over the land in question in a condemnation action, filed in 1937, that had concluded in a 1938 judgment. In the government's view the judgment awarded the United States an unrestricted flowage easement up to 96 feet above mean sea level.

The condemnation petition in the 1937-1938 action stated that the Bonneville Project was then expected to flood the lands permanently up to 72.5 feet above mean sea level, and that the natural flow of the Columbia River would periodically and occasionally raise the level of the river to 91 feet above mean sea level (C.A. App. 20).[3] It further recited that because of seepage, wave action, and the like, the Secretary of War had concluded that it was "necessary to acquire a flowage easement up to 96 feet above mean sea level" over the lands in question (*id.* at 20-21).

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[1]"R." refers to the Clerk's Record filed in the court of appeals.

[2]The United States also sought to acquire title to timber and improvements on the land and the continuing right to clear brush and debris and maintain mosquito control (Pet. App. A-2 to A-3).

[3]"C.A. App." refers to the appendix in the government's brief filed in the court of appeals. The parties asked the district court to take judicial notice of the presently existing record of the 1937-1938 proceedings in the district court, and that record was designated for inclusion on appeal. For the convenience of the court of appeals, copies of pertinent documents from the 1937 trial were reprinted in the government's opening brief on appeal. We are lodging a copy of that brief with the Clerk of the Court.

During the course of the trial leading to the 1938 judgment, the parties disagreed on exactly what interest was being condemned by the United States. The landowners argued that the government's right to flood the land was completely without restriction up to the 96-foot mark, and that the landowners' underlying fee was valueless. Thus, in their brief in that proceeding the landowners stated (C.A. App. 47-48):

> Would the United States, without further condemnation proceedings, or the acquiring of any easement other than that being herein condemned, and without payment of further damages, have a right to, for instance, raise the permanent pool level of the Bonneville Dam to an elevation of 90 feet, so long as such change affected no lands higher than 96 feet in elevation?
>
> It is the position of the defendants in this proceeding that the Government in this case will acquire "a flowage easement up to 96 feet above mean sea level" and that said easement will amount to "a perpetual right, power, privilege and easement", and that the first ten lines of paragraph IV [of the petition in condemnation] do not constitute a restriction upon the easement but rather descriptions of only the presently contemplated use. That a further use would be the right of the petitioner under the easement taken herein.

The United States argued, to the contrary, that it was taking a right of permanent flooding only up to 72.5 feet above mean sea level and a right occasionally and periodically to flood up to 96 feet (C.A. App. 51-55). It emphasized the landowners' continuing use of the land even with the easement imposed (*id.* at 52).

The landowners won this legal dispute in the proceeding leading to the 1938 judgment. Thus, in one of its instruc-

tions to the jury, the district court stated (C.A. App. 65):[4] "As you already know, throughout the progress of this protracted case the thing the Government is condemning here is a perpetual flowage easement without limitation or restriction up to an elevation of 96 feet above mean sea level." Similarly, another instruction stated (*ibid.*): "I charge you, therefore, that the owners, severally, of the parcels of land in question are entitled to the full value of their lands at and below 96 feet above mean sea level * * *."

The final judgment in the proceeding decreed a vesting in the United States of "the right and easement to overflow and flood each of the tracts of land described in [the condemnation petitions] up to the 96-foot contour line above mean sea level" (C.A. App. 85).

2. On the basis of the record in the 1937-1938 condemnation proceeding, the government filed a pretrial motion in this case to limit testimony to the value of rights other than the flowage easement (Pet. App. A-14). The district court denied the government's motion (*id.* at A-13 to A-20), and a trial was subsequently held to determine the value of the interests petitioned for. It resulted in a judgment for $522,000, plus interest (*id.* at A-35 to A-36).

3. On the government's appeal, the court of appeals reversed (Pet. App. A-1 to A-10). The court concluded that the plain language of the 1938 judgment, as well as the instructions indicating the basis for the jury's verdict in the 1937-1938 action, demonstrated that the 1938 judgment gave the government the right permanently to flood up to an elevation of 96 feet above mean sea level (*id.* at A-6 to A-8) and that the owners in that earlier action had been compensated for " 'the full value of their lands at and below' " that level (*id.* at A-8).

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[4]This language is taken from one of four jury instructions quoted verbatim in the landowners' petition for a new trial. The file did not contain a complete set of jury instructions.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The issues presented involve the construction and application of a judgment in a 1937 condemnation action, and they have little precedential significance. Review by this Court is accordingly unwarranted.

1. Contrary to petitioner's contention (Pet. 13-20), the court of appeals had ample support for its conclusion that in the 1937 condemnation action the United States paid for and acquired an unlimited flowage easement up to 96 feet above mean sea level. The easement was described in the judgment as "a flowage easement over each of [the tracts in litigation] up to 96 feet above mean sea level" and the jury instructions (pages 3-4, *supra*) clearly directed the jury to value the land as if an unlimited easement were being taken. These are clearly more relevant to a determination of the meaning of the judgment than isolated statements taken from the condemnation petition.

2. Petitioner's contention (Pet. 21-23) that the decision of the court of appeals denies it equal protection of the laws is without merit. Petitioner argues in effect that even if the court of appeals is correct in finding that the government had already paid for the flowage easement in question, the government must pay for the easement again if it erroneously overpaid any other landowners. In the absence of any showing that petitioner was deprived of such a windfall[5] on the basis of a suspect classification, the argument is frivolous.

---

[5]The record shows that the land concerned here was in the ownership of the Dickey family in 1937-1938, when the original easement was acquired and paid for (May 17, 1977 Tr. 18). "Tr." refers to the transcript of proceedings in the district court.

In any event, it is not clear that petitioner was treated unequally in comparison with a number of similarly situated landowners. As noted above (pages 3-4), the United States originally sought to take an easement of less than 96 feet in the 1937 action involving petitioner's land and was forced to take a larger one by the condemnees. Petitioner has not shown that the condemnees in the original condemnation actions affecting the properties concerned in the cases cited at Pet. 22 succeeded in forcing the United States to acquire the larger easement. As for the million-dollar payment for a parcel bound by the 1938 judgment (Pet. 23), petitioner relies on assertions in oral argument by its counsel, and the record does not show whether the acquisition of rights in that parcel was in all other respects equivalent to the situation here.[6]

3. Finally, petitioner asserts (Pet. 23-29) that the United States should be estopped from asserting its previously acquired easement up to the 96-foot level. To the extent that this argument is a restatement of the one, made in the court of appeals, that the government is estopped from asserting title to the full easement simply because it initiated a condemnation action against such an easement naming petitioner as the owner, it should be rejected for the reason given by the court of appeals (Pet. App. A-6): "Initiation of a condemnation action does not constitute a waiver by the Government of previously acquired rights. *See United States* v. *93.970 Acres of Land*, 360 U.S. 328 (1959); *Mollohan* v. *Gray*, 413 F. 2d 349 (9th Cir. 1969) (dictum)."

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[6]We note that petitioner is not the only landowner against whom the United States has asserted prior ownership of the unrestricted 96-foot easement. The United States is asserting this position in at least two cases pending in the Eastern District of Washington: *United States* v. *85.32 Acres in Klickitat County, Wash. (Klickitat County Port District No. 1)*, No. C-74-314 (filed Dec. 31, 1974); *United States* v. *Sperry*, No. C-74-273 (filed Nov. 22, 1974).

Petitioner's contention that an estoppel should be found because petitioner detrimentally relied on the condemnation complaint and the payment of funds into the court before the government asserted the effect of the 1938 judgment is an argument that was not raised in the court of appeals and that, accordingly, should not be considered by this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977). In any event, there is no merit to the claim. Petitioner does not assert that any "extensive diking and pumping" allegedly undertaken after the government filed the complaint in 1975 (Pet. 25) was rendered useless by the government's success in establishing that it need not pay now for a flowage easement that it had paid for in 1938. Petitioner is not aided by the two decisions of this Court on which it relies (Pet. 26-27). This is not a case in which the government has abandoned a taking (see *Danforth* v. *United States*, 308 U.S. 271, 284 (1939)) or a previous position regarding a state's jurisdiction over certain areas (*United States* v. *Louisiana (Louisiana Boundary Case)*, 394 U.S. 11, 73 n.97 (1969)), but rather one in which the government has abandoned a mistaken effort to acquire a property interest it had already taken and paid for pursuant to an earlier judgment reflecting the successful litigation effort of persons in privity with petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CAROL E. DINKINS
Assistant Attorney General

JACQUES B. GELIN
EDWARD J. SHAWAKER
Attorneys

APRIL 1981

DOJ-1981-04